
(2004) 07 AP CK 0078
In the Andhra Pradesh High Court
Case No : CRP No. 2502 of 2004

Mididodi Saraswathi and Another

APPELLANT

Vs

Mandal Revenue Officer and Others

RESPONDENT

Date of Decision : 27-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 27 Rule 4, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 5 Rule 12

Citation : (2004) 5 ALD 276 : (2005) 1 CivCC 233

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : B. Barasimha Sarma, for the Appellant;

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—The petitioners filed O.S. No.98 of 2003 in the Court of the Junior Civil Judge, Nagarkurnool, for declaration in respect of the suit schedule property and consequential injunction. They also filed I.A. No.309 of 2003 under Order 39 Rules 1 and 2 of C.P.C., for grant of temporary injunction. The Trial Court ordered notice to the respondents. Since the respondents were officials and agents of the Government, the process server of the Court sought to serve the notice on the Assistant Government Pleader appointed for that Court. He refused to receive the notice on the ground that two more copies were not attached.

2. The matter came up for enquiry on 14-11-2003. On that day, the Trial Court took note of the endorsements and treated that there was proper service on the respondents in view of the provisions of Order 27, Rule 4 and Order 5, Rule 12 of C.P.C. Thereafter, it allowed the I.A.

3. The respondents filed I.A. No. 315 of 2003 under Order 9, Rule 13 of C.P.C., to set aside the order, dated 14-11-2003. They pleaded that they were set ex parte and an ex parte order of temporary injunction was passed. The manner in which

the notices were sought to be served etc., were pleaded. The petitioners raised an objection that the only course open to the respondents is to file an appeal against the order, dated 14-11-2003 in I.A. No. 309 of 2003, or to seek adjudication of the matter on merits. It was their case that provisions of Order 9, Rule 13 of C.P.C., do not apply to the proceedings under Order 39, Rules 1 and 2 of C.P.C. The Trial Court accepted the plea raised by the petitioners and dismissed I.A. No. 315 of 2003, through its order, dated 10-12-2003. Aggrieved thereby, the respondents filed C.M.A. No. 1 of 2004 in the Court of the Senior Civil Judge, Nagarkurnool. The learned Senior Civil Judge allowed the C.M.A., setting aside the order passed in I.A. No. 315 of 2003. The learned Judge observed that the respondents ought to have been given an opportunity to contest I.A. No.309 of 2003 on merits.

4. Learned Counsel for the petitioners submits that the course adopted by the lower Appellate Court does not conform to the principles of law. He submits that the provisions of Order 9, Rule 13 of C.P.C., do not apply to the proceedings under Order 39, Rules 1 and 2 of C.P.C., and as such, I.A. No. 315 of 2003 ought not to have been directed to be considered on merits. He placed reliance upon the judgment rendered by this Court in Metta Chandra Sekhara Rao Vs. Ganga Ram and Another, .

5. Petitioners filed the suit for the relief of declaration and consequential injunction. They also filed I.A. No.309 of 2003 under Order 39, Rules 1, and 2 of C.P.C. The Trial Court has chosen to order notice as provided for under Rule 3 of Order 39 C.P.C. As all the respondents are the officials of the Government, the process server sought to serve the notice on the Assistant Government Pleader appointed for the Trial Court. By raising an objection, the Assistant Government Pleader refused to receive the notice. The endorsement made by the Assistant Government Pleader was treated as constituting service, in view of the provisions of Order 5, Rule 12 and Order 27, Rule 4 of C.P.C. To this extent, no exception can be taken to the course adopted by the Trial Court. It was entitled to proceed to consider the application filed under Order 39, Rules 1 and 2 of C.P.C., on merits.

6. A reading of the order, dated 14-11-2003 passed by the Trial Court discloses that after referring to the facts relating to service of notice, it allowed the I.A., just with this observation: "in view of the rejection to receive notice, the petition is allowed".

7. When law requires recording of reasons even for granting an ex parte temporary injunction, the obligation on the part of the Trial Court to record reasons, touching on existence of prima facie case and balance of convenience in favour of the petitioners, was much more for allowing the application. The fact that the agent of the respondents i.e., the Assistant Government Pleader refused to receive the notice, did not relieve the Trial Court from its obligation to discuss the matter on merits and to satisfy itself as to the existence of prima facie case and balance of convenience. It is settled principle of law that even where a

defendant remains ex parte, the Trial Court is not entitled to decree the suit, unless it was satisfied on merits as to the proof of the claim of the plaintiff. It has to record reasons in support of its conclusions. Even assuming that there was proper service on the respondents and that they have chosen to remain ex parte, the Trial Court ought to have recorded reasons before allowing the I.A. Therefore, the course of action adopted by the Trial Court, in straight away allowing the I.A., without recording reasons cannot be said to be in accordance with law.

8. The respondents could have taken recourse to either preferring an appeal against the order passed in I.A. No. 309 of 2003 or ought to have insisted the Court to dispose of the matter on merits. Instead, they have filed an application under Order 9, Rule 13 of C.P.C. It hardly needs any emphasis that an order passed under Order 39, Rules 1 and 2 of C.P.C., does not answer the description of the decree as defined under Sub-section (2) of Section 2 C.P.C., and that provisions of Order 9, Rule 13 of C.P.C., do not get attracted unless an ex parte decree, as such exists. In Metta Chandra Sekhara Rao's case (*supra*), this Court held that filing of an application under Order 9, Rule 13 of C.P.C., to set aside an order passed under Order 39, Rule 1 of C.P.C., is untenable. The Trial Court rightly dismissed the I.A. No. 315 of 2003 filed by the respondents to set aside the order passed in I.A. No.309 of 2003.

9. The lower Appellate Court had set aside the order passed by the Trial Court, dismissing I.A. No. 315 of 2003. However, mere setting aside the order passed in I.A. No. 315 of 2003, does not improve the situation in any manner. Though not expressly, the operative portion of the order passed in C.M.A. indicates that the lower Appellate Court expressed the view that I.A. No. 309 of 2003, deserves to be dealt with on merits. Hence, this Court does not find any basis to interfere with the course of action adopted by the lower Appellate Court though there exists some defect as to the form.

10. The CRP is accordingly dismissed, however, directing that the Trial Court shall hear and dispose of I.A. No. 309 of 2003, afresh on merits, un-influenced by any observation made by itself in the order in I.A. No. 315 of 2003, or by the lower appellate Court, or by this Court, treating the order passed by it on 14.11.2003, as an ex pane order of temporary injunction. No costs.